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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

VAHAN HARUTYUNYAN, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;	No. B208434 (Super. Ct. No. BA 338353) (Steven R. Van Sicklen, Judge, and Henry J. Hall, Commissioner)
PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	

ORIGINAL PROCEEDING. Petition for writ of mandate. Steven R. Van Sicklen, Judge, and Henry J. Hall, Commissioner. Petition denied.

Wegman, Levin & Stanley and Michael M. Levin for Defendant and Petitioner.

Michael P. Judge, Public Defender, and John Hamilton Scott, Deputy Public Defender, as Amicus Curiae on behalf of Petitioner.

Steve Cooley, District Attorney, Phyllis C. Asayama, Shirley S.N. Sun and Natasha Cooper, Deputy District Attorneys, for Real Party in Interest.

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Petitioner Vahan Harutyunyan is charged with grand theft, conspiracy to commit grand theft and with multiple counts of money laundering. He is currently incarcerated in the Los Angeles County Jail, with his bail set at $1,987,000. After appearing three times before Commissioner Henry J. Hall on April 7, 9 and 18, 2008, on April 25, 2008, petitioner's counsel informed the court that petitioner would not stipulate to Commissioner Hall. Over petitioner's objections, the preliminary hearing was continued on April 25, 2008, and May 13, 2008, by Commissioner Hall.

On June 12, 2008, petitioner filed a petition for a writ of mandate in this court, claiming that Commissioner Hall lacked the authority to continue the preliminary hearing and that petitioner was entitled to a dismissal because the preliminary hearing had not been conducted within 10 court days after his arraignment. We denied the petition summarily on July 10, 2008. On September 24, 2008, the Supreme Court granted review, directed us to vacate our order denying the petition and required us to issue an order to show cause why the petition should not be granted.

We issued the order to show cause. After briefing and oral argument, we filed our opinion on December 19, 2008, in which we granted the petition on the ground that, absent a stipulation, Commissioner Hall had no authority to continue the preliminary hearing. We granted the petition for rehearing filed by the real party in interest, received supplemental briefs and again heard oral argument. We now conclude that the matter has become moot. Accordingly, we deny the petition and remand with directions.

PROCEDURAL HISTORY

In a complaint filed on April 3, 2008, petitioner and five codefendants were charged with Medicare fraud; the complaint set forth one count of conspiracy to commit grand theft, 24 counts of money laundering and one count of grand theft. The complaint contained special enhancement allegations claiming that over $1 million was taken by the defendants. The same day, an arrest warrant was issued in the amount of $1,987,000.

Petitioner appeared with counsel on April 7, 2008, in Department 30 before Commissioner Hall, who continued his arraignment to April 9, 2008. On April 9, 2008, all six defendants, petitioner included, appeared before Commissioner Hall, who, after taking the defendants' waivers, continued the matter as to all the defendants for arraignment and plea to April 15, 2008. The hearings of April 7 and 9, 2008, were in all respects uncontested. The minute order for the hearing of April 9, 2008, indicates that it was stipulated that Commissioner Hall could hear the cause as a temporary judge.

Petitioner was arraigned on April 15, 2008, and entered not guilty pleas to all the charges. On the same day, Commissioner Hall received favorable "own recognizance" (OR) reports about five of the six defendants, petitioner included. After hearing counsel on the matter of OR releases or in the alternative for a reduction of bail, Commissioner Hall indicated that he was not inclined to release any of the defendants OR. He stated that he would take the request for a bail reduction under submission and rule later that afternoon on this request. All the defendants, including petitioner, requested the bail reduction hearing to be calendared for April 18, 2008.

On April 17, 2008, Commissioner Hall entered a three-page order in which he found that the bail of "$1,987,000 or *more* is the appropriate bail in this matter."

On April 18, 2008, Commissioner Hall stated that the "[m]atter here as 3 of 10 for preliminary hearing. Request is to continue within the period to April 25, 2008, as 8 of 10. We will trail within the time period as to all defendants to April 25, 2008, as 8 of 10." Petitioner's counsel objected to the bail but Commissioner Hall did not change his ruling. According to a declaration by the deputy district attorney, petitioner's counsel told the court clerk prior to this hearing that "in light of the bail ruling he would no longer stipulate to the Commissioner." This was the first that the deputy heard of any objection to Commissioner Hall.

The hearing on April 25, 2008, commenced with Commissioner Hall stating: "I'm going to refer to a case [citing *Foosadas v. Superior Court* (2005) 130 Cal.App.4th 649 (*Foosadas*)]. And in that case at page 656, the Court of Appeal noted

as follows: [¶] 'Presiding over a motion to continue a hearing or preliminary hearing conferences are subordinate to judicial duties because they do not raise complex facts and legal issues or contested questions of law.' [¶] So I recognize that there are non-stips in this case as to me, and that's fine. However, I do believe under *Foosadas* that I can preside over the motion to continue this preliminary hearing and/or proceedings to assign it out." The quotation was not entirely accurate.[1] Nor, as we discuss below, was the issue in *Foosadas* the continuance of a preliminary hearing.

Petitioner's counsel replied that four of the six defendants, including petitioner, opposed a continuance, while two defendants requested a continuance. Thus, counsel argued, "the court is going to have to make a factual finding due to cause. That is not a subordinate duty but a factual finding. And that is specifically something that we would have to stipulate to and would respectfully request that the court reconsider its position." Commissioner Hall declined to change his ruling.

After further remarks by other counsel and the court about bail that are not material to the proceedings before us, petitioner's counsel stated that he would file a habeas petition, that he was not "stipulating," and that he would add the violation of the "ten-day speedy prelim rights" to the habeas petition.

The next item on the agenda was the waiver of time by the two defendants who requested a continuance. Commissioner Hall then found that there was good cause to continue the matter to May 13, 2008, stating that this was a "lengthy, complex case." There were many documents to be reviewed and other issues such as the identity of informants and witnesses to be studied. Commissioner Hall stated: "We'll establish good cause as to the remaining defendants [the four defendants, including petitioner, who objected to the continuance]. This is a matter that should not be litigated twice.

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[1] The passage states: "The real party in interest agrees that presiding over a motion to continue a hearing and *pre-preliminary hearing conferences* are subordinate judicial duties because they do not raise complex facts and legal issues or contested questions of law." (*Foosadas*, *supra*, 130 Cal.App.4th at p. 655.)

There would be no grounds that I could see to legally sever these defendants. So under Penal Code section 1050.1,[2] I am going to find that this matter will be continued as to the objecting defendants."

On May 13, 2008, Commissioner Hall stated that four of the six defendants requested a continuance due to the volume of discovery, i.e., discovery in excess of 4,000 pages. Commissioner Hall went on to find that there was good cause to continue the hearing, and he noted that two of the defendants, including petitioner, were not waiving time. He also noted that June 15, 2008, was the 60th day for the purposes of Penal Code section 859b. (This provision requires dismissal of the complaint if the preliminary hearing has not been held within 60 days from arraignment.)

Petitioner's counsel stated: "For the record, Your Honor, on behalf of [petitioner], we do not stipulate as previously noticed. We also do not waive time and we are announcing ready and we move to sever." Commissioner Hall referred again to *Foosadas*, *supra*, 130 Cal.App.4th 649 and stood by his earlier ruling. He continued the matter to June 2, 2008.

On May 12, 2008, Judge Steven R. Van Sicklen denied petitioner's petition for a writ of habeas corpus. The order denying the petition found, citing *Foosadas*, *supra*, 130 Cal.App.4th 649, that a motion to continue a hearing is a subordinate judicial duty and therefore does not require a stipulation to a commissioner. The order also found

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2 "In any case in which two or more defendants are jointly charged in the same complaint, indictment, or information, and the court or magistrate, for good cause shown, continues the arraignment, preliminary hearing, or trial of one or more defendants, the continuance shall, upon motion of the prosecuting attorney, constitute good cause to continue the remaining defendants' cases so as to maintain joinder. The court or magistrate shall not cause jointly charged cases to be severed due to the unavailability or unpreparedness of one or more defendants unless it appears to the court or magistrate that it will be impossible for all defendants to be available and prepared within a reasonable period of time." (Pen. Code, § 1050.1.)

that on April 18, 2008, none of the six defendants, including petitioner, had objected to have the matter continued by a commissioner.

We address the matter of *Foosadas* below. (Text, *post*, pp. 8-10.) The court's finding that there was no objection to a continuance on April 18, 2008, was not accurate because on that day the court noted that the matter would trail to April 25, 2008. In any event, unlike on April 25, 2008, there was no objection on April 18, 2008, to the request for a continuance. This made the matter uncontested and thus Commissioner Hall could dispose of it in his capacity as a commissioner. (Text, *post*, p. 8, citing and discussing Code Civ. Proc., § 259, subd. (g).)

On June 2, 2008, petitioner's counsel stated that he was ready to proceed and that pursuant to Penal Code sections 859b and 1050.1, petitioner was entitled to be released OR as his preliminary hearing had been continued for the third time beyond the 10-day period. Counsel went on to state: "In an effort to accommodate counsel and the court and due to the various complexities involved, my client [petitioner] is prepared to waive his absolute right to the preliminary hearing within 60 days, but we are still declaring ready. We do not agree to a continuance beyond the 10-day period which would be today, and we renew our objection as to the fact that we have not stipulated." The court then addressed the petitioner directly: "Mr. Harutyunyan, you have a right to have a preliminary hearing within 60 calendar days of your original arraignment in this matter. Your attorney has indicated that you are willing to waive and give up that right and agree that this matter -- well, and agree that if there is good cause, this matter can be continued to July the 7th, 2008; is that correct, sir? [¶] DEFENDANT HARUTYUNYAN: Yes."

A little later, the court asked petitioner's counsel whether the petitioner was willing to stipulate that the day would be "zero of 60." Counsel replied: "Well, in the since [sic] that as to the 60-day period, that today could be counted as day zero. In other words, I guess what he would stipulate to is he's not going to bring a motion to dismiss based on a violation of the 60-day rule; however, he is not stipulating today to a general time waiver and thereby abrogating his 10-day rights. He is prepared to give

up his 60-day rights." The court then continued the preliminary hearing to July 7, 2008.

DISCUSSION

1. Petitioner Waived His Right to a Preliminary Hearing Within 60 Days of His Arraignment

Petitioner's counsel contends that petitioner did not waive his right to a preliminary hearing within 60 days of his arraignment; counsel claims that he only agreed not to bring a motion to dismiss based on a violation of the 60-day rule.

It is true that counsel made a statement along these lines during the hearing held on June 2, 2008. However, it is also true that petitioner personally waived his right to have the preliminary hearing held within 60 days. In fact, when petitioner's counsel first addressed this subject, he stated among other things that petitioner was "prepared to waive his absolute right to the preliminary hearing within 60 days" and he ended his remarks on this subject by stating that petitioner was "prepared to give up his 60-day rights."

On this record, we conclude that on June 2, 2008, petitioner waived his right to have the preliminary hearing held within 60 days of his arraignment. We turn to the effect of this waiver on the instant proceedings.

2. The Waiver of the 60-Day Rule on June 2, 2008, Moots Violations of the 10-Day Rule Prior to That Date

We understand that petitioner's counsel attempted to preserve what he thought was a violation of the 10-day rule as of April 25, 2008. The difficulty with this position is that we cannot return the case to April 25, 2008, and, assuming we conclude that the court erred on that date, fashion a remedy for the error as of April 25, 2008.

As it was, the case continued to June 2, 2008, when petitioner waived the 60-day requirement. Necessarily subsumed within the waiver of the 60-day requirement on June 2, 2008, was a waiver of the 10-day requirement as of June 2, 2008. Thus, *as of June 2, 2008*, there was an alleged violation of the 10-day requirement on April 25,

2008, but there was no longer a violation of either the 10-day or the 60-day rule. In other words, there was, historically, an alleged error that had not been remedied but that error no longer existed on and after June 2, 2008.

The paradox in attempting to preserve the violation of the 10-day rule that occurred on April 25, 2008, and the 60-day waiver on June 2, 2008, becomes apparent if one assumes that the violation of the 10-day rule would be remedied by a dismissal sometime after June 2, 2008. That is, the case would be dismissed for the violation of a time requirement even though petitioner waived time on June 2, 2008.

We conclude that petitioner's waiver of the 60-day requirement mooted the alleged violation of the 10-day rule on April 25, 2008.

We note that there is no issue about Commissioner Hall's authority as of June 2, 2008, as the proceedings on that day were uncontested. (Code Civ. Proc., § 259, subd. (g).) Commissioner Hall's orders of April 25 and May 13, 2008, continuing the preliminary hearing are moot in light of petitioner's waiver of June 2, 2008. We therefore do not address the issue of his authority on these two dates.

3.* Foosadas, supra, *130 Cal.App.4th 649 Did Not Empower Commissioner Hall to Continue the Preliminary Hearing over Petitioner's Objection

In light of the possibility that there may well be further proceedings relating to the preliminary hearing, we address the matter of *Foosadas*. Contrary to Commissioner Hall's ruling, and the opinion of the court that denied petitioner's petition for a writ of habeas corpus, *Foosadas* did not authorize Commissioner Hall to continue, over petitioner's objection, the preliminary hearing on April 25, 2008.

In *Foosadas*, the defendant was arraigned on a felony complaint charging him with failing to stop at the scene of an accident. "Following a series of appearances at the Tracy branch of the San Joaquin County Superior Court for arraignment and pre-preliminary hearing conferences variously conducted by judges, retired judges, and by Commissioner Kronlund, not acting as a temporary judge, a preliminary hearing was set before Commissioner Kronlund." (*Foosadas*, *supra*, 130 Cal.App.4th at p. 653.) The defendant filed a written notice of "nonstipulation" to Commissioner Kronlund,

who disallowed the defendant's refusal to stipulate. The commissioner based his ruling on a local rule, which provided that the parties were deemed to have stipulated to a commissioner acting as a temporary judge unless an oral or written objection was made in open court prior to the commencement of the first hearing on the matter. (*Ibid.*)

The appellate court held that "[t]he trial court's attempt to create a rule that a party must object to the participation of a commissioner prior to the first hearing on a case, whether or not the hearing involves the performance of subordinate judicial duties not requiring a stipulation, is without legal foundation." (*Foosadas*, *supra*, 130 Cal.App.4th at p. 655.) The appellate court held that a preliminary hearing does not involve a subordinate judicial duty and that, for this reason, the defendant would have had to stipulate to Commissioner Kronlund. The court held the local rule in question to be invalid. (*Ibid.*)

We have already set forth the passage from *Foosadas* on which Commissioner Hall and the superior court relied. (Fn. 1, *ante*.) There are three reasons why reliance on *Foosadas* was misplaced.

First. The passage on which the commissioner and the superior court relied speaks of continuing a "hearing and *pre-preliminary* hearing *conferences*," not of continuing the preliminary hearing itself. There is a substantial difference between a pre-preliminary hearing conference and the preliminary hearing. While the former is likely to involve routine and uncontested matters, the latter is a contested, adversarial proceeding. And, as the proceedings in this case illustrate, the continuance of a *preliminary hearing*, as opposed to a pre-preliminary hearing conference, in a case involving multiple defendants may well be a sharply contested matter.

Second. The passage in question is based on the correct assumption that continuing a *pre-preliminary hearing conference* usually does not involve complex facts, legal issues or contested questions of law. None of this is true of continuing the preliminary hearing in this case. For one, the continuance of the preliminary hearing

raised the complex question whether *In re Samano* (1995) 31 Cal.App.4th 984 was correctly decided and whether it should be followed.

Third. The passage is entirely extraneous to the holding of the appellate court, which was that the local rule deeming the parties to have stipulated in the absence of an initial objection was invalid. Thus, the passage is dictum.

Foosadas did not authorize Commissioner Hall to preside over a contested hearing on the subject of continuing the preliminary hearing.

DISPOSITION

The petition for a writ of mandate is denied and remanded with directions to hold a preliminary hearing within 10 days after this opinion has become final.

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FLIER, J.

We concur:

RUBIN, Acting P. J.

BIGELOW, J.